



July 30, 1999

Mr. Tommy Gunn
Attorney at Law
202 S. Border Street
Orange, Texas 77630

OR99-2145

Dear Mr. Gunn:

You ask whether certain information is subject to required public disclosure under the Texas Public Information Act, chapter 552 of the Government Code. Your request was assigned ID# 126400.

The City of Pinehurst (the "city") received a request for "copies of any paperwork regarding the recent suspensions of the three police department employees," "any correspondence regarding disciplinary issues with Officer Donald Washington," and "Washington's hire date, any extended periods of disability, his suspension record and his salary." You state that some of this information is being forwarded to the requestor. You contend that the remaining information is excepted from disclosure under sections 552.024, 552.101, 552.102, 552.108, and 552.111 of the Government Code. We have considered the exceptions you claim and reviewed the documents at issue.

First, you contend that the submitted documents are protected by a right to privacy. Section 552.101 excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Section 552.102 excepts from disclosure "information in a personnel file, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." Section 552.102 protects information in personnel files only if it meets the test articulated under section 552.101 for common-law invasion of privacy. *Hubert v. Harte-Hanks Tex. Newspapers*, 652 S.W.2d 546 (Tex. App.--Austin 1983, writ ref'd n.r.e.).

For information to be protected from public disclosure by the common-law right to privacy, the information must meet the criteria set out in *Industrial Foundation of the South v. Texas*

Industrial Accident Board, 540 S.W.2d 668, 683-85 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977). In *Industrial Foundation*, the Texas Supreme Court stated that information is excepted from disclosure if (1) it is highly intimate or embarrassing such that its release would be highly objectionable to a reasonable person, and (2) it is not of legitimate concern to the public. *Id.* at 685. We have consistently held that the public has a legitimate interest in the job performance of public employees. See Open Records Decision Nos. 473 (1987), 470 (1987). Because the documents at issue concern the on-the-job misconduct of public employees, the public has a legitimate interest in these documents and they are not protected by the common-law right to privacy. Therefore, the city may not withhold these documents from disclosure under section 552.101 or section 552.102 based on a right to privacy.

You also contend that some of the submitted documents should be excepted from disclosure based on the principle of false-light privacy. The Texas Supreme Court has held that false-light privacy is not an actionable tort in Texas. *Cain v. Hearst Corp.*, 878 S.W.2d 577, 579 (Tex. 1994). In addition, in Open Records Decision No. 579 (1990), the attorney general determined that the statutory predecessor to section 552.101 did not incorporate the common-law tort of false-light privacy, overruling prior decisions to the contrary. Open Records Decision No. 579 at 3-8 (1990). Thus, the truth or falsity of information is not relevant to our consideration of whether information must be publicly disclosed under the Public Information Act.

Several of the submitted documents, or portions thereof, are excepted from disclosure under section 552.101 in conjunction with section 19A(b) of article 4413(29cc) of Vernon's Texas Civil Statutes which provides as follows:

Except as provided by Subsection (d) of this section, a person for whom a polygraph examination is conducted or an employee of the person may not disclose to another person information acquired from the examination.

Both polygraph reports and references to polygraph results are confidential under section 19A(b), and the city must withhold such information from disclosure pursuant to section 552.101. We have marked the protected information accordingly (see markings in exhibits 1 and 3).

You contend that all of the submitted documents are excepted from disclosure under section 552.111. Section 552.111 excepts from disclosure "an interagency or intraagency memorandum or letter that would not be available by law to a party in litigation with the agency." In Open Records Decision No. 615 (1993), this office reexamined the predecessor to the section 552.111 exception in light of the decision in *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408 (Tex. App.--Austin 1992, no writ), and held that section 552.111 excepts only those internal communications consisting of advice, recommendations,

opinions, and other material reflecting the policymaking processes of the governmental body. An agency's policymaking functions do not encompass internal administrative or personnel matters; disclosure of information relating to such matters will not inhibit free discussion among agency personnel as to policy issues. ORD 615 at 5-6. Additionally, section 552.111 does not generally except from disclosure purely factual information that is severable from the opinion portions of internal memoranda. ORD 615 at 4-5. Because the submitted documents relate to personnel matters and policy issues, the documents are not excepted from disclosure under section 552.111.

You argue that all of the submitted documents should be excepted from disclosure under section 552.108 because the documents pertain to internal investigations undertaken by the Pinehurst Police Department. Section 552.108 is not applicable to internal affairs investigations where no criminal investigation takes place. *Morales v. Ellen*, 840 S.W.2d 519, 526 (Tex. App.--El Paso 1992, writ denied). Only the documents in exhibit 3 pertain to a criminal investigation. Section 552.108 does not apply to any of the other submitted documents.

Section 552.108(a)(2) excepts from disclosure "[i]nformation held by a law enforcement agency or prosecutor that deals with the detection, investigation, or prosecution of crime . . . if . . . it is information that deals with the detection, investigation, or prosecution of crime only in relation to an investigation that did not result in conviction or deferred adjudication." You explain that the criminal investigation to which exhibit 3 relates concluded in a result other than conviction or deferred adjudication. Based upon this representation, we find that most of the information in exhibit 3 is excepted from disclosure pursuant to section 552.108(a)(2).

We note, however, that information normally found on the front page of an offense report is generally considered public. *See generally* Gov't Code § 552.108(c); *Houston Chronicle Publ'g Co. v. City of Houston*, 531 S.W.2d 177 (Tex. Civ. App.--Houston [14th Dist.] 1975), *writ ref'd n.r.e. per curiam*, 536 S.W.2d 559 (Tex. 1976); Open Records Decision No. 127 (1976). Thus, the city must release the types of information that are considered to be front page offense report information, even if this information is not actually located on the front page of the offense report. Additionally, the arrest warrant affidavit in exhibit 3 is not protected by section 552.108. *See Star Telegram, Inc. v. Walker*, 834 S.W.2d 54, 57 (Tex. 1992) (documents filed with a court are generally considered public and must be released). Although section 552.108(a)(2) authorizes you to withhold the remaining information in exhibit 3 from disclosure, you may choose to release all or part of the information at issue that is not otherwise confidential by law. *See* Gov't Code § 552.007.

Finally, you contend that the social security numbers of peace officers are excepted from disclosure under section 552.024. We agree that the city must withhold the social security numbers from disclosure. Section 552.117(2) provides for the confidentiality of peace

officers' social security numbers. Similarly, section 552.117(1) protects the social security numbers of current or former officials or employees of a governmental body who request that this information be kept confidential under section 552.024. Current and former officials and employees of a governmental body are entitled to this protection only if they opt for the protection under section 552.024 prior to the governmental body's receipt of a request for the information. *See* Open Records Decision No. 530 at 5 (1989) (whether particular piece of information is protected by section 552.117 is determined at time request for it is made). The protection for peace officers, however, is automatic. Thus, the city must withhold the peace officers' social security numbers from disclosure pursuant to section 552.117(2).

We are resolving this matter with an informal letter ruling rather than with a published open records decision. This ruling is limited to the particular records at issue under the facts presented to us in this request and should not be relied upon as a previous determination regarding any other records. If you have questions about this ruling, please contact our office.

Sincerely,



Karen E. Hattaway
Assistant Attorney General
Open Records Division

KEH/ch

Ref: ID# 126400

Encl. Marked documents

cc: Ms. Glenda Dyer
The Orange Leader
200 West Front Street
Orange, Texas 77630
(w/o enclosures)